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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANN RICHARDS, Governor of Texas, *et al.*,
Appellants,

v.

AL VERA, *et al.*,
Appellees.

REV. WILLIAM LAWSON, *et al.*,
Appellants,

and

ROBERT REYES, *et al.*,
Appellants,

v.

AL VERA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

Here, Texas had the ability to ensure minorities full, fair, and equal participation in the political process and the opportunity to elect their candidate of choice by drawing compact districts consistent with the Constitution. Instead, it chose to abandon all traditional districting principles and constructed districts with racial precision to create racially "safe" districts and to protect incumbents. Thus, the questions presented in this case are, under such circumstances:

1. Whether voters living in, or in districts adjacent to bizarrely shaped, racially "safe" districts have standing to challenge the constitutionality of such districts?

2. Whether the direct and circumstantial evidence that Texas was motivated by racial considerations in formulating Congressional Districts ("CDs") 18, 29, and 30, and their contiguous districts, was sufficient to trigger strict scrutiny?

3. Whether Texas has a compelling state interest in racial gerrymandering, particularly where there has been no showing that the lines drawn for CDs 18, 29, and 30 were required by the Voting Rights Act or were otherwise necessary to remedy past racial discrimination?

4. Whether Texas employed narrowly tailored means to advance its allegedly legitimate racial interests in creating CDs 18, 29, and 30, when Texas rejected many more compact, less bizarre alternatives?

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MOTION TO AFFIRM

Appellees respectfully urge that the Court affirm the judgment below invalidating portions of Texas House Bill 1 ("HB 1"), 72nd Tex. Leg., 2d C.S. (Aug. 29, 1991). A unanimous three-judge panel found that Texas CDs 18, 29, 30, and their surrounding districts, unconstitutionally segregate voters by race into districts that are among the most bizarre in the Nation. While the record below is sufficient to warrant summary affirmance under *Shaw v. Reno,* 113 S. Ct. 2816 (1993), Appellees believe

that this case presents an appropriate vehicle for the Court to provide useful additional guidance to state legislatures and lower courts by affirming the decision below after plenary review.

STATEMENT OF THE CASE

The districts at issue here have been much commented-upon. CD 30 has been described as "a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandered district in the United States." *Terrazas v. Slagle*, 789 F. Supp. 828, 834 (W.D. Tex. 1991), *aff'd*, 113 S. Ct. 29 (1992). *Roll Call* awarded CD 30 first prize in its "gerrymander contest for the weirdest shaped 1992 districts." Appendix to Appellees' Motion to Affirm (App.) at 1a. CDs 29 and 18 received "honorable mention." *Id.* CD 29 has been likened to a "sacred Mayan bird," with its "plumed head ris[ing] northward . . . [and] ruffled feathers jut[ting] out at odd angles." Michael Barone and Grant Ujifusa, *The Almanac of American Politics* 1276 (1994). The interlaced boundaries of CDs 18 and 29 are described as "grotesque." *Id.* In drawing such districts, Texas rejected many more compact alternatives. Instead, the State "tortuously constructed [these districts] block-by-block and from one side of the street to another across entire counties to satisfy the desired racial goal." *Vera v. Richards*, No. H-94-0277, slip op. at 92, State App. 76a[1] (S.D. Tex. Aug. 17, 1994) ("*Vera*").

A. Background of Appellees' Challenge to Texas's Congressional Redistricting Plan

Texas is a multi-ethnic community. A significant number of Anglo voters in Texas support African-American and Hispanic candidates in both primary and general elections. For example, during the 1980s, African-Americans

[1] "State App. —a" refers to the Appendix to the Jurisdictional Statement For State Appellants.

comprised as little as 35%-40% of the population of old CD 18.[2] Yet Blacks were able to elect their candidate of choice in CD 18—from Barbara Jordan to Sheila Jackson Lee—100 percent of the time. *See Narrative of Voting Rights Act Considerations in Affected Districts* (Sept. 1991) ("*Narrative*"), App. at 9a; Plaintiffs' Exhibit 14K, App. at 17a. Generally, since 1983, African-Americans who comprised at least 40% of the population in any given Texas district have been able to elect their candidate of choice approximately 97% of the time. Plaintiffs' Exhibit 14K, App. at 17a. Since 1983, even when Blacks comprised as little as 35% of a district's population, they were still able to elect their candidate of choice almost 60% of the time. *Id.* The continued success of Black and Hispanic candidates in Houston's at-large elections illustrates the present-day level of Anglo cross-racial voting.[3] "In Texas in the 1990's, it is no longer accurate to assume that this condition [of Anglo majorities voting as a bloc to defeat minority candidates] exists in every case." *Vera*, slip op. at 87 n.54, State App. 71a n.54.

B. Development of Texas's Redistricting Plan

The population of Texas increased substantially between the 1980 and 1990 Census. As a result, Texas was apportioned three additional congressional districts, and had to redistrict. *Narrative*, App. at 3a. "[R]acial data were an omnipresent ingredient in th[is] redistricting process." *Vera*, slip op. at 69, State App. 59a. The computer

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[2] In 1980, African-Americans comprised only 40.8% of the population. Plaintiffs' Exhibit 13B at 55. By 1990, this figure had dropped to 35%. *Narrative of Voting Rights Act Considerations in Affected Districts* (Sept. 1991), App. at 9a.

[3] An African-American was elected as an at-large representative to the Houston City Council more than twenty years ago. Since that time, at least one member of the City Council elected at-large has been African-American; currently, there are two. Similarly, an Hispanic was first elected in an at-large city election more than 20 years ago; currently one Hispanic holds an at-large city-council seat.

system that Texas used to draw district lines, known as REDAPPL, constantly evaluated and displayed congressional districts, counties, cities, VTD's ("voter tabulation districts," or precincts), and even census blocks, by race. As a result, when the State redrew its congressional boundary lines, it had "nearly exact knowledge of the racial makeup of every inhabited block of land in the state." *Id.* at 2, State App. 1a-2a. Although REDAPPL could have handled additional information, the State chose not to enter any other demographic data (*e.g.*, income, education, etc.) on to the system. *Id.* at 69, State App. 59a. As a result, "REDAPPL certainly provided a readily available, efficient means of" allocating voters "on the basis of race." *Id.* at 26, State App. 26a.

C. Texas's Redistricting Plan

Rejecting more compact alternative redistricting plans, the Texas Legislature in 1991 adopted plan C657 as House Bill 1. Stipulation No. 30. This plan created three new racially "safe" districts for Blacks and Hispanics (CDs 28, 29, and 30), and increased the African-American population in another (CD 18).[4] The boundaries of all of these districts appear to be drawn exclusively to achieve the desired racial composition. *Vera*, slip op. at 70, State App. 59a-60a. ("In the Dallas Metroplex area and the Harris County area, . . . the racial character of the line-drawing is manifest.").[5]

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[4] Thirty-four Texas counties were split by this plan. Only six of these splits were required because the population of those counties exceeded the number of persons required for a single district. By comparison, the 1980 Congressional redistricting plan split just 10 counties. Three of those splits were required by the "one-person, one-vote" rule. See Plaintiffs' Exhibits 8, 27, 34-Q, and 36 at 12.

[5] *See also Vera*, slip op. at 38-39, State App. 35a-36a. Indeed, the same may be said about almost all of Texas's congressional districts. *Id.* at 46, State App. 41a ("Many of the remaining districts challenged by the plaintiffs share a troubling characteristic: counties appear to be split along racial lines.").

1. *CD 30 (Dallas County)*

"Throughout the course of the Congressional redistricting process, the lines of the proposed District 30 were constantly reconfigured in an attempt to maximize the voting strength for this black community in Dallas County." *Narrative*, App. at 4a. As a result, CD 30 "is at least 25 miles wide and 30 miles long, but those measurements do not begin to reveal the district's geographical complexity." *Vera*, slip op. at 74, State App. 62a. Sprawling throughout Dallas County, CD 30 splits all 21 of the municipalities found in the district. Plaintiffs' Exhibit 34T; *see* Attachment 1 (map of CD 30 showing split municipalities). It excludes wealthy Anglo neighborhoods such as Highland Park and University Park, but includes Hamilton Park, an affluent African-American neighborhood. It curls around Irving and takes in minority neighborhoods behind the Dallas-Fort Worth Regional Airport. At the same time, it extends fingers into Collin County, which includes only the outermost suburbs of Dallas, picking up one small African-American neighborhood. The district reaches into Tarrant County, where it picks up a small border area with a high African-American concentration. *See Vera*, slip op. at 74, State App. 62a; Attachment 2 (map of CD 30).*

"Part of the district [even] runs along the [uninhabited] Trinity River bottom, using it to connect dispersed minority population." *Vera*, slip op. at 74, State App. 62a. This was thought necessary, in part, because, as testified by Congresswoman (then State Senator) Eddie Bernice Johnson, "the principal architect" of CD 30, *id.* at 31, State App. 30a, since 1980 "the whole core of th[e Black] area was moving out." *Id.* at 30, State App. 28a. Al-

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* "Further, evidence in this case indicates that Congressional District 30 extends to the northern part of Dallas County specifically to include the Jewish Community Center and surrounding Jewish neighborhoods." *Vera*, slip op. at 5, State App. 7a (Hittner, J., concurring). As Judge Hittner noted, this religious gerrymandering "directly implicates equal protection principles" as well. *Id.* at 4, State App. 86a.

though some of the "many alternative proposals . . . showed a more compact configuration, none of them reached the threshold 50% total black population which the community felt was necessary to *assure* its ability to elect its own Congressional representative *without having to form coalitions with other minority groups*." *Narrative*, App. at 5a (emphasis added).[7]

Racially integrated residential neighborhoods in Dallas County present a substantial impediment to single-race majority districts. The only "remedy" to this residential integration is splitting precincts by race. Thus, after redistricting, 39% of the population of CD 30 lives in split precincts. Plaintiffs' Exhibit 34R. In addition, there are 17 precincts with fewer than 20 registered voters and 13 precincts with no registered voters at all. Plaintiffs' Exhibit 34Q. As the lower court found, "the contours of Congressional District 30 are unexplainable in terms other than race. They have no integrity in terms of traditional, neutral redistricting criteria. Neighborhoods, VTDs [precincts], and individual streets were split to achieve the district's racial mix." *Vera*, slip op. at 78, State App. 65a.[8]

2. CDs 18 and 29 (Harris County, Houston)

"Even more than in the case of District 30, Congressional Districts 18 and 29 were tailored to include designated numbers of minority voters." *Id.* An "appreciation for the precision with which this segregation of Hispanics and African-Americans in Harris County was carried out may not be had without a detailed look at the map of District 18 based on African-American popu-

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[7] For example, then-State Senator Johnson, who resided in (and now does) represent CD 30, submitted a plan proposing a more compact CD 30 that would have been 44 percent African-American and 33.3 percent Hispanic. Plaintiffs' Exhibit 98A.

[8] The court below rejected the State's assertion, relying on a demographic study compiled specifically for trial, that "there are socioeconomic, geographic, and other similarities among the residents of District 30." *Vera*, slip op. at 78, State App. 65a.

lation distribution by Census block and the map of District 29 based on Hispanic population distribution by Census block." *Id.* at 38, State App. 35a; *see also* Attachments 3 and 4 (maps of CDs 18 and 29). "In fact, these districts are so finely 'crafted' that one *cannot* visualize their exact boundaries without looking at a map at least three feet square." *Vera*, slip op. at 39, State App. 36a (emphasis in original).[9]

As in Dallas, Houston's integrated housing patterns were a practical barrier to the creation of compact districts where one minority group would constitute a majority. *Id.* ("The geographic dispersion of the various minority communities within Harris County is definitely an obstacle in drawing a majority-minority district each for African-Americans and Hispanics.") "[T]he population of CD 18 has shifted over the last ten years resulting in the current district having only 35.1% total black population and 42.2% total Hispanic population." *Narrative*, App. at 9a. Nonetheless, new CD 18 "contains 50.9% total black population and 15.3% total Hispanic. The Hispanic population that is currently in District 18 has been shifted to the newly proposed Hispanic District 29." *Id.* CD 29 is 60.6 percent Hispanic.[10]

"The effect of splitting dozens of VTD's to create Districts 18 and 29 was an electoral nightmare." *Vera*, slip op. at 43, State App. 39a. Many voters were "thrust into new and unfamiliar precinct alignments, a few with populations as low as twenty voters." *Id.* "In Districts 18 and 29, 60% of the residents live in split precincts after redistricting." *Id.* at 81, State App. 67a.[11] Similarly, all

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[9] Appellees have lodged such over-sized maps with the Court.

[10] In drawing these districts, the Texas Legislature again rejected more compact proposals. Eddie Bernice Johnson's plan for CD 18 would have been 46.9 percent African-American. Her proposed CD 29 would have been 47.6 percent Hispanic. Plaintiffs' Exhibit 29-A.

[11] Only 221 of the existing 672 precincts in Harris County were not split by the plan. Moreover, in Harris County alone, the

eight of the cities found in CD 18 have split populations and fourteen municipalities in CD 29 are split. Plaintiffs' Exhibit 34T; *see* Attachment 5 (map of CDs 18 and 29 showing split municipalities). Analysis of the split precincts revealed that "an overwhelming majority of those individuals placed in District 29 were Hispanic while an overwhelming majority placed in District 18 were African-American." *Vera*, slip op. at 82 n.51, State App. 68a n.51.

D. Department of Justice Preclearance

Texas's *Narrative* noted the Legislature's intention to ensure that the three new congressional seats apportioned to Texas:

> should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives. Accordingly, the three new districts include a predominantly black district drawn in the Dallas County area and predominantly Hispanic districts in the Harris County area and in the South Texas region. In addition to creating the three new minority districts, the proposed Congressional redistricting plan increases the black voting strength of the current District 18 (Harris County) by increasing the population to assure that the black community may continue to elect a candidate of its choice.

Narrative, App. at 3a; *see also Vera*, slip op. at 29-32, State App. 29a-31a (discussing the drawing of "safe" racially gerrymandered seats).[12]

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number of precincts rose from 672 to 1225, with 140 of those precincts having fewer than 20 registered voters. In addition, 62 precincts had no registered voters whatsoever. Plaintiffs' Exhibit 6E1 at 3. These single-race split VTDs are the building blocks of race-based districting.

[12] The extensive efforts to make these racially gerrymandered seats utterly "safe" highlights the disingenuousness of Texas's attempt to now characterize them as "opportunity" districts. *See, e.g.*, Texas Jurisdictional Statement at 4-8.

In preclearing the Texas Congressional redistricting plan pursuant to § 5 of the Voting Rights Act, the United States Attorney General took the remarkable step of expressing constitutional reservations:

> While we are precleering this plan under Section 5, the extraordinarily convoluted nature of some districts compels me to disclaim any implication that the proposed plan is otherwise lawful or constitutional.

Id. at 3, State App. 8a.

E. The *Terrazas v. Slagle* Litigation

Texas's original redistricting plan was unsuccessfully challenged under the Voting Rights Act. At trial, Congresswoman Johnson testified that race was the most important factor in the redistricting process. For example, when asked whether a dominant goal existed in redistricting Dallas County, she replied:

> I had made a commitment to the Black community, that they would have a safe district, as had been mandated and expected for a number of years, and I did not intend to go home without that.

Id. at 29, State App. 28a. "In sum, Congresswoman Johnson testified in *Terrazas* that the shape of Congressional District 30 . . . can be understood as a conscious effort to pick up African-American voters who had dispersed from the core area." *Id.* at 31, State App. 29a.[13] Similarly, Representative Martinez, "the primary architect of the lines in Harris County," *id.* at 41, State App. 37a, testified that the creation of two single-race majority dis-

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[13] Congresswoman Johnson further elaborated that, in drawing CD 30, she did not worry about the influences of incumbent Congressmen Martin Frost or John Bryant. *Vera*, slip op. at 31, State App. 30a ("I got beat up so many times because I wouldn't do anything but look out for Black voters.").

tricts was the primary motivating factor in the redistricting of Harris County.[14]

F. Decision Below

The plaintiffs in this case are six registered voters who reside in CDs 18, 25, 29, and 30. All have been involved in grass-roots political organizations, as well as in civic or public affairs. One, Al Vera, is partly Hispanic and partly Native-American. He lives in CD 29. Another plaintiff, Dr. Ed Chen, is a fourth-generation Chinese-American. A third, Edward Blum, was a candidate for Congress from the new CD 18 in 1992.

Plaintiffs filed this constitutional challenge on January 26, 1994.[15] The case was tried before a three-judge panel on June 27-30, and concluded on July 1, 1994. The District Court filed its Opinion on August 17, 1994. The court concluded that Texas "repeatedly segregated [African-American, Hispanic, and Anglo] populations by race to further the prospects of incumbent officeholders or to create 'majority-minority' Congressional districts." *Vera*, slip op. at 2, State App. 8a. It found that CDs 18, 29, and 30

> were conceived for the purpose of providing 'safe' seats in Congress for two African-American and an Hispanic representatives [sic]. They were scientifically designed to muster a minimum percentage of the favored minority or ethnic group, minority num-

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[14] *Vera*, slip op. at 41, State App. 37a ("[I]t was a very important goal as a Hispanic representative to insure that we created for the first time a Congressional seat for the Hispanic community to elect the first Hispanic Congressman.") (quoting testimony of Rep. Martinez).

[15] Their original complaint asked for a permanent injunction and declaratory judgment against the Governor, the Lieutenant Governor, the Attorney General, and the Secretary of State, as well as the Speaker of the Texas House of Representatives. The court later granted the motions to intervene of six African-American voters ("Lawson Intervenors"), the United States, and seven registered Hispanic voters and the League of United Latin American Citizens ("Bayes Intervenors").

> bers are virtually all that mattered in the shape of those districts. Those districts consequently bear the odious imprint of racial apartheid, and districts that intermesh with them are necessarily racially tainted.

Id. at 4, State App. 9a.

The court rejected Texas's argument that incumbent protection, and not invidious racial discrimination, explained the bizarre nature of the districts. It said:

> [T]he policy of incumbent protection, to the extent it motivated the Legislature, was not a countervailing force against racial gerrymandering. Instead, racial gerrymandering was an essential part of incumbency protection, as African-American voters were deliberately segregated on account of their race among several Congressional districts.

Id. at 78, State App. 65a.

Applying strict scrutiny, the court found that, even if the Voting Rights Act could substantiate a compelling governmental interest, the State's admission "that more traditional districts could have been fashioned" made it "impossible" for the State to argue "that Districts 18, 29, and 30 are 'narrowly tailored' to fulfill the State's obligations under the Voting Rights Act and would thus withstand the strict scrutiny test." *Id.* at 85, State App. 70a.[36]

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[36] With respect to certain other Texas congressional districts plaintiffs challenged as unconstitutional, the court found "an extremely high correlation between the irregular features of many of these districts and the racial populations they are drawn to include or exclude." *Vera*, slip op. at 90-91, State App. 75a; *see also* Plaintiffs' Exhibit 14H. Nonetheless, the court determined that "it does not follow . . . that racial gerrymandering occurred." *Vera*, slip op. at 91, State App. 75a. The court based this judgment on its view that the outlines of these other districts were not "highly irregular apart from the small racially distinct appendages." *Id.* Plaintiffs respectfully disagree. They have decided not to appeal that factual determination, however, to simplify the case for the Court, because of limited resources, and because the pending Louisiana case presents the issue of rural, as opposed to urban, gerrymanders. *See Hays v. State of Louisiana*, 862 F. Supp. 119 (W.D. La. 1994), appeal filed, 63 USLW 3295 (U.S. Sept. 26, 1994)

The State's notice of appeal was filed on September 22, 1994, and its Jurisdictional Statement was submitted on October 31, 1994. The Lawson and Reyes Defendant-Intervenors submitted their Jurisdictional Statement on November 2, 1994. This Court has jurisdiction under 28 U.S.C. § 1253.

GROUNDS FOR AFFIRMANCE

In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), this Court held that challenges to districts that are "so extremely irregular on [their] face that [they] rationally can be viewed only as an effort to segregate the races for the purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification" state "a cognizable claim" under the Equal Protection Clause. *Id.* at 2820, 2824. The *Shaw* Court, however, did not determine the merits of that challenge, remanding it for further consideration. This case presents a straight-forward, and appropriate, opportunity for the Court to apply *Shaw* in a concrete context and thus provide additional guidance to lower courts and state legislatures.

The extensive record and the careful opinion below squarely present the question of whether a state may intentionally construct highly bizarre districts on the basis of race solely to maximize a single race's voting strength or to protect incumbents. Moreover, Texas has drawn such districts where (a) it was under no legal compulsion to do so, and (b) it admittedly rejected more compact alternatives that would have achieved the goal of enhancing minority representation but which would not have relied so heavily on the impermissible criterion of race.

To win this case, Appellees do not and need not attack the State's ability to draw compact, majority-minority districts that comply with traditional districting

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(No. 94-558) ("*Hays II*"). Moreover, affirmance of the decision below would force the Texas Legislature to redraw essentially all of its congressional districts in a manner consistent with the Constitution.

principles. Rather, Appellees object to Texas's use of race in two contexts. First, without showing a need to overcome racial bloc voting, the State relies on race to draw districts that guarantee to a designated racial or ethnic group the ability to determine the outcome of an election through its own bloc voting without its having to forge alliances with any other group. Second, the State maintains that it may use race to assure the reelection of incumbents.

In the Texas of the 1990s, the State need not rely upon districts dominated by African-Americans, Hispanics, or Anglos. Rather, the choice here is between creating bizarre, racially "safe" districts for the benefit of a specific minority group, on the one hand, or creating compact, racially competitive districts on the other. Given these choices, perverting American politics as Texas did is entirely unjustified and unconstitutional.

The Court has pending before it at least four other cases involving *Shaw* claims.[17] This case is unlike those other cases, though, in that it involves racial gerrymandering in an urban context. Moreover, the State here admittedly rejected more compact alternatives that still would have enhanced electoral opportunity for minorities in Texas without elevating race over all other considerations. Also, the State was under no credible legal compulsion to racially gerrymander as it did. Thus, regardless of whether the Court chooses to review any of the other pending cases, this case presents discrete and important questions concerning the proper application of *Shaw*, and warrants affirmance after plenary review.

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[17] *See Hays II*, 862 F. Supp. 119; *Johnson v. Miller*, 1994 WL 506780 (S.D. Ga. Sept. 12, 1994), *appeal filed*, 63 USLW 3314 (U.S. Oct. 6, 1994) (No. 94-631); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *appeal filed*, —— USLW —— (U.S. Nov. 21, 1994) (No. 94-923); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *appeal filed*, 63 USLW 3127 (U.S. Aug. 8, 1994) (No. 94-275).

I. DISTRICTS 18, 29, AND 30 ARE SUFFICIENTLY BIZARRE TO GIVE APPELLEES STANDING TO CHALLENGE THEM UNDER THE FOURTEENTH AMENDMENT.

Appellants' allegation that Appellees lack standing ignores *Shaw v. Reno* and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (group of Blacks had standing to challenge Alabama's reformulation of the City of Tuskegee's boundaries to exclude them). As every post-*Shaw* court to consider the issue of standing has concluded, voters in the state have standing to challenge bizarrely shaped districts that appear to be explainable only on the basis of race.[18] Appellees here therefore satisfy the requisite elements of standing to assert such a claim.

A. A Voter Has Standing To Challenge A Redistricting Scheme That Appears So Bizarre That It Cannot Be Understood As Anything Other Than A Racial Gerrymander.

In *Shaw v. Reno*, this Court recognized that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race . . . reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular group rather than their constituency as a whole." *Shaw v. Reno*, 113 S. Ct. at 2828. Under this notion of harm, a voter is injured by any redistricting scheme that "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Id.* As *Shaw* expressly held, such harm is cognizable under the Fourteenth Amendment, *id.* at 2820, and thus grants standing to sue. *Vera*, slip op. at 58 n.38, State

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[18] *See, e.g., Vera*, slip op. at 58 n.38, State App. 50a n.38 (concluding that plaintiffs have standing); *Shaw v. Hunt*, 861 F. Supp. at 425 ("[P]laintiffs have adequately established their standing . . . ."); *Miller*, 1994 WL 506780 at *13 ("standing in this case is not in doubt."); and *Hays v. State of Louisiana*, 839 F. Supp. 1188, 1192-93 (W.D. La. 1993) ("*Hays I*") (same).

App. 50a n.38. (The *Shaw* Court "inferentially decided [that the *Shaw* plaintiffs] had constitutional standing to sue."); *see also Miller*, 1994 WL 506780 at *12 (same).

Here, at least one Appellee lives in each of the CDs that the lower court declared to be unconstitutional. *See* Texas Jurisdictional Statement at 20-21. Others live in the distorted neighboring districts. Thus, "[t]he plaintiffs . . . have standing to maintain the Equal Protection claim . . . because they have established that they are registered to vote in [Texas's] congressional elections and that the challenged redistricting plan assigns them to vote in particular electoral districts at least in part because of their race." *Shaw v. Hunt*, 861 F. Supp. at 473.

B. Appellees Suffered Cognizable Stigmatic And Systemic Harms Because Of The Bizarre Nature Of The Racially Gerrymandered Districts.

The Appellees in this case particularly suffer from the type of stigmatic and systemic harms that *Shaw v. Reno* identifies as problematic. Mr. Blum testified that he felt stigmatized by Texas's racially polarized redistricting process. *See* Texas Jurisdictional Statement at 20. Appellee Vera was stigmatized by the perpetuation of the stereotype that, as an Hispanic, he "think[s] alike, share[s] the same political interests, and prefer[s] the same candidates [as other Hispanics]." *Shaw v. Reno*, 113 S. Ct. at 2818.

Moreover, as discussed below, the bizarre districts here create barriers to political participation, candidate effectiveness, and responsive representation. *See* Section II.B.2, pp. 20-21, *infra*. Appellees have unquestionably suffered cognizable injuries due to HB 1. Those injuries would be redressed by the constitutional reconfiguration of these districts. The Appellees here satisfy the standing requirements for a *Shaw v. Reno* claim.

II. IN FORMULATING AND DRAWING "SAFE," SINGLE-RACE MAJORITY DISTRICTS 18, 29, AND 30, TEXAS ENGAGED IN INVIDIOUS RACIAL GERRYMANDERING, WHICH TRIGGERS STRICT SCRUTINY.

Although HB 1, like all redistricting legislation, is nominally race-neutral, the direct and indirect evidence in this case overwhelmingly establishes that Texas has "segregate[d] the races for purposes of voting, without regard for traditional districting principles." *Shaw v. Reno*, 113 S. Ct. at 2824. "In this case . . . the legislature's intent was proven directly, through testimony of legislators, the § 5 preclearance submission, and the use of racial data on the REDAPPL system, as well as inferentially from the makeup of the districts themselves." *Vera*, slip op. at 77 n.47, State App. 64a n.47. HB 1 must therefore be subjected to "the same close scrutiny that [the Court] give[s] other state laws that classify citizens by race." *Shaw v. Reno*, 113 S. Ct. at 2825. HB 1 may be upheld only if it is "narrowly tailored to further a compelling state interest." *Id.*[19]

A. There Is Overwhelming Direct Evidence That Texas Was Motivated By Racial Considerations When It Formulated Congressional Districts 18, 29, And 30.

The testimony of Texas officials in *Terrazas v. Slagle* and the State's own *Narrative* acknowledge that Texas's primary goal in redistricting was to segregate voters by race. *See* pp. 4-10, *supra*. Congresswoman Johnson's testimony in *Terrazas v. Slagle*, discussed at length above, is particularly revealing.[20] The *Narrative*, like the

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[19] That the purpose of Texas's racial classification is ostensibly "benign" by no means reduces the close scrutiny that Texas's race-based determination warrants. *See, e.g., Shaw v. Reno*, 113 S. Ct. at 2829 (rejecting contention that racial gerrymandering does not create a constitutional problem when district lines are drawn to favor a minority, rather than the majority).

[20] *See* pp. 9-10, *supra*.

State's submission here, proves that Texas's goal was to construct districts "in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives." *Narrative,* App. at 3a.[21]

As the lower court found, all other considerations took a back seat to this overtly racial motivation. The State apparently adopted Congresswoman Johnson's erroneous (and unconstitutional) view of the Voting Rights Act. She testified that:

> See, in my judgment, the Voters [sic] Rights Act protects voters—not land, not boundaries—other than the State line. . . . And gerrymandering is permitted, as long as it's to enhance the enfranchisement of the minority voters.

Plaintiffs' Exhibit 8B at 253.[22]

B. Texas's Disregard For Traditional Districting Principles Further Demonstrates That Race Was A Motivating Factor In Drawing Districts 18, 29, And 30.

Alternatively, this case can also be affirmed under the inferential approach approved in *Shaw*. *Shaw* establishes that plaintiffs can show that a state's redistricting plan was motivated by race "*indirectly* or *inferentially*. Racial gerrymandering . . . can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose." *Hays v. State of Louisiana,* 839 F. Supp. 1188, 1195 (W.D. La. 1993) (*"Hays I"*) (emphasis in original). This is one of the cases where, as the *Shaw* Court accurately predicted, it is "not . . .

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[21] *See also* Texas's Jurisdictional Statement at 7-8 (conceding that Texas was "race-conscious" in drawing CDs 18, 29, and 30); *Narrative,* App. at 9a (the changes in CD 18 and the configuration of CD 29 "result in the maximization of minority voting strength for this geographical area.").

[22] *Contra Johnson v. DeGrandy,* 114 S. Ct. 2647, 2660 (1994) ("[f]ailure to maximize [the number of majority-minority districts] cannot be the measure of § 2").

difficult at all" to show that strict scrutiny applies. *Shaw v. Reno*, 113 S. Ct. at 2826. Texas has "concentrate[d] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at 2827 (emphasis added). On this basis alone, Appellees meet their burden of presenting *prima facie* evidence that Texas engaged in racial gerrymandering. *See Shaw v. Hunt*, 861 F. Supp. at 440.

1. *The Challenged Districts Are Extraordinarily Non-Compact*

CDs 18, 29, and 30 are among the least compact congressional districts in the United States.[23] Specifically, CDs 18 and 29 have the least regular borders in the Nation. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 565 (1993) ("Pildes & Niemi") (ranking CDs 18 and 29 as tied for first with two other congressional districts as having the least regular borders in the country).[24] Texas CD 30 is similarly

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[23] The Appellants repeatedly denigrate as subjective and unduly activist a judicial inquiry into whether districts are, in fact, compact. Lawson & Reyes Jurisdictional Statement at 20; Texas Jurisdictional Statement at 18-19. The federal courts have been undertaking such an analysis for years, however, in the context of § 2 claims under the Voting Rights Act, with reasonably predictable and consistent results. *See, e.g., Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993).

[24] A district's relative compactness turns on how dispersed or spread out its borders are. A district's relative contiguousness turns on the degree to which its borders are regular in shape and equal in length. Pildes & Niemi at 549. Voting rights scholars measure a district's relative compactness by taking the ratio of the district's area to the area of the smallest circle that completely encloses the district (yielding the district's "dispersion or compactness score"). *Id.* at 554. A district's relative contiguousness is measured by taking the ratio of the district's area to the area of a circle with the same perimeter (yielding a district's "perimeter" or contiguousness score). *Id.* Districts with the most regular

determined to be among those districts with the least regular borders. *Id.*[25] In addition, CDs 18, 29, and 30 are well below the national median when measuring compactness. *Id.*

The extraordinarily non-compact nature of CDs 18, 29, and 30 powerfully suggests that Texas has engaged in invidious discrimination in formulating its reapportionment plan. As discussed above and as the maps reveal, the districts' outer boundaries do not follow natural geographical features. Rather, they zig-zag, widen, and narrow with geographic irrationality but racial precision. The borders are explainable by one factor and one factor only—that is, the race of the residents who are included and excluded from the districts. *See Vera,* slip op. at 38 & 78, State App. 36a & 65a. *See also id.* at 70, State App. 60a ("The borders of Districts 18, 29 and 30 change . . . in seemingly arbitrary fashion until one realizes that those corridors connect minority populations.").

The State and Lawson/Reyes Intervenors essentially contend that any district drawn within an urban area is sufficiently compact. Texas Jurisdictional Statement at 15-17; Lawson/Reyes Jurisdictional Statement at 11-13, 24-25. This position is untenable. If anything, the urban context of these districts provides additional evidence of impermissible racial gerrymandering. As the District Court below stated,

> all parties and their expert witnesses agreed, compactness must be a relative measure for Legislative districts. . . . In a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when

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borders score 1.0; those with the least regular borders score .00. Texas CDs 18 and 29 score a 0.1 on this scale, and Texas CD 30 earns a .02 perimeter score. *Id.* at 565.

[25] That a district is literally contiguous is irrelevant. A state can draw a contiguous district around any group of voters, no matter where each voter lives. *See Marylanders for Fair Representation, Inc. v. Schaefer,* 849 F. Supp. 1022, 1052 n.38 (D. Md. 1994).

> viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location. Adjusting the sense of compactness to the complexity and population density of the urban landscape demonstrates that Districts 18 and 29 are not compact at all. Their contorted shapes are the antithesis of compactness.

Vera, slip op. at 83, State App. 68a-69a.

2. *The Failure of CDs 18, 29, And 30 To Respect Existing Political Subdivisions And Communities Harms Political Participation And Responsiveness.*

A legislative district can do violence to existing political subdivisions even when the district is entirely within one large political subdivision, such as a county.[26] CDs 18 and 29 divide 16 municipalities, while CD 30 splits 21. *See* Plaintiffs' Ex. 34T; *see also* Attachments 1 and 5.[27] Plainly, these districts fail to accommodate existing political subdivisions.

Apart from shape and size, district lines that undermine effective political organization and inhibit meaningful voter participation fail to satisfy traditional districting principles.[28] The isolated and distended pockets of voters created by the otherwise irrational construction of the districts under challenge here spawned administrative con-

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[26] *See, e.g., Growe*, 113 S. Ct. at 1083-85 (holding that a state senate district which split up sections of Minneapolis was an "oddly shaped creation" of "dubious" compactness); *Gomillion*, 364 U.S. at 341 (concluding that an "uncouth" 28-sided city map was "not an ordinary geographic redistricting measure").

[27] Attachments 1 and 5, with each splintered municipality in a different color, demonstrate the extent to which CDs 18, 29, and 30 fail to respect existing political subdivisions and destroy cohesive neighborhood interests.

[28] *See, e.g., East Jefferson Coalition for Leadership & Dev. v. Jefferson Parish*, 691 F. Supp. 991, 1007 (E.D. La. 1988) (district running along river shore that shot across the river to include a pocket of African-American residents failed to maintain a recognizable community and precluded effective political representation).

fusion and electoral barriers to voter participation. *See Vera,* slip op. at 43, 67 n.43 & 78, State App. 39a, 56a n.43 & 66a-67a. To illustrate, voters were frustrated and confused by the meandering shape of CD 18. They did not know the candidates running for office, and asked why the district had been arbitrarily changed. *See* Powers Dep. at 43-44, App. at 20a-21a. The numerous and artificial boundaries meant that neighbors could not discuss candidates with each other.

In addition, "a district should not be so convoluted that its representatives could not easily tell who actually lives in the district." *East Jefferson Coalition for Leadership & Dev. v. Jefferson Parish,* 691 F. Supp. 991, 1007 (E.D. La. 1988).[29] These districts fail such a standard. For example, Appellee Blum and his wife "spent months walking the entire district in order to shake hands with the voters. They had to carry a map to identify the district lines, because so often the borders would move from block to block." *Vera,* slip op. at 80, State App. 66a-67a.

The disfiguration of these districts along bizarre racial lines also undercuts all notions of political responsiveness. Revealingly, former CD 18 Representative Craig Washington informed a Houston television audience that he was elected to represent the African-Americans of Houston and that he was "not supposed to represent everyone in the 18th District." Access Houston Cable T.V. (Apr. 14, 1992).

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[29] *See also Bryant v. Lawrence County,* 814 F. Supp. 1346, 1350-51 (S.D. Miss. 1993) (district that carved up sections of a county and crossed a river where there are no bridges split up established neighborhoods and made it difficult for elected officials to traverse the district); *Gunn v. Chicksaw County,* 705 F. Supp. 315, 322-23 (N.D. Miss. 1989).

C. Showing That Voters Were Allocated By Race To Protect Incumbents Does Not Defeat A Claim That Strict Scrutiny Applies.

Texas claims that its primary motive in constructing the bizarre districts at issue here was not creating racially "safe" districts, but a desire to protect incumbents. First, as demonstrated in Section II(A)-(B), *supra*, the direct and indirect evidence precludes the State from carrying its "burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977). Second, despite Texas's claims to the contrary, Appellees need not show that race was the *only* factor that motivated Texas to draw district lines as it did. Rather, for strict scrutiny to apply, Appellees simply need to prove what is inescapably the case here—that race was a "motivating factor" in the creation of the district in question. *Arlington Heights*, 429 U.S. at 264-65 (rejecting contention that plaintiffs must show that challenged state action "rested solely on racially discriminatory purposes") (relying on *Washington v. Davis*, 426 U.S. 229 (1976)).[30] Indeed, any other conclusion would negate *Shaw*; "[a] state legislature could always trot out some other traditional districting principle minimally served by the shape

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[30] *See also Regents of University of California v. Bakke*, 438 U.S. 265, 288, 299-310 (1978) (subjecting racially separate admissions program to strict scrutiny despite fact that state medical school had other, non-racial reasons for the program, including pursuit of educational diversity); *Shaw v. Hunt*, 861 F. Supp. at 431 (requiring evidence that "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process"); *Miller*, 1994 WL 506780 at *16-*17 (same); *Hays I*, 839 F. Supp. at 1198 ("[p]laintiffs have the burden of demonstrating by a preponderance of the evidence that the Legislature was 'motivated by racial considerations' ") (*quoting Wright v. Rockefeller*, 376 U.S. 52, 55 (1964)).

in question." *Miller*, 1994 WL 506780 at *16 (citation omitted).[31]

Thus, Texas cannot shield HB 1 from strict scrutiny by claiming, *post hoc*, that the ultimate reason it segregated voters by race was to protect existing incumbents. This Court has never condoned incumbent protection in which "the representatives have selected the people," instead of "the people select[ing] their representatives," *Vera*, slip op. at 66, State App. 56a, as a legitimate—let alone compelling—redistricting criterion that would justify an invidious racial classification. *Id.* at 88, State App. 72a.

True, this Court has not held that gerrymandering to protect incumbents is "in and of itself" unconstitutional. *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (that "district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness"). And in *White v. Weiser*, 412 U.S. 783, 791 (1973), the Court noted that it did not "disparage" state attempts to protect incumbents. These decisions, however, countenance, but hardly endorse, drawing districts to avoid contests between incumbents or to preserve the shape of the prior districts.

Certainly, prior cases cannot be relied upon to justify racial gerrymandering to aid existing incumbents. As the lower court held,

> never before have districts been drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of the incumbents. This form of incumbent protection is much different in degree from the generalized, and legitimate, goal of

[31] Under the State's view, for example, any nominally contiguous district would defeat a *Shaw* claim. A state could always show that it had taken at least one other factor—contiguity—into account. *See also Shaw v. Hunt*, 861 F. Supp. 408.

> incumbent and seniority protection previously recognized by the Supreme Court.

Vera, slip op. at 65, State App. 55a (citing cases).

The State and Lawson/Reyes Intervenors essentially contend that the existence of an additional, non-racial justification of incumbent protection permits Texas to segregate voters by race without being subjected to strict scrutiny. This sweeping contention, if accepted, would negate all *Shaw* claims. "Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). If all a state had to do to justify race-based redistricting was show that the borders were also responsive to political concerns, no voter could ever successfully challenge racial redistricting.[32]

The lower court unequivocally found that "incumbent protection in Dallas County involved the allocation of African-American voters among the districts," *Vera*, slip op. at 35, State App. 33a, and that "the goal of incumbent protection was itself realized by the deliberate segregation of voters on the basis of race in the Harris County metropolitan area." *Id.* at 82, State App. 68a. The Fourteenth Amendment prohibits such race-based allocation and segregation. Accordingly, strict scrutiny applies.[33]

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[32] The State contends that the borders resulted from a struggle over Democrats, not African-Americans. *See* Texas's Jurisdictional Statement at 5, 8, and 14. The lower court properly rejected this claim, concluding: "The State cannot have it both ways. It cannot say that African-American voters are African-American when they are moved into District 30, but they are merely 'Democrats' when they are deliberately placed in a contiguous district for the purpose of bolstering the re-election chances of other Democrats." *Vera*, slip op. at 77, State App. 64a. *See also id.* at 29-33, 37-69, State App. 28a-31a, 33a-60a (finding persuasive the testimony in the *Terrazas v. Slagle* case that race was the primary motivation in districting).

[33] *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977) ("*UJO*"), on which the State relies, is inapposite.

III. TEXAS HAS NOT AND CANNOT SHOW THAT IT HAS A COMPELLING STATE INTEREST IN RACIALLY GERRYMANDERING "SAFE" DISTRICTS 18, 29, AND 30.

Given the overwhelming direct and indirect evidence of invidious racial discrimination here, Texas bears the burden of showing that its racial classifications are necessary to serve a compelling governmental interest and are applied in a narrowly tailored manner.[34] It is argued that this burden is satisfied because the Voting Rights Act required Texas to create these three single-race majority districts.[35] This argument is in error. First and foremost, the Voting Rights Act cannot—and does not—require the creation of districts that would violate the Constitution. Thus, Texas may not employ racial classifications where, as here, it has failed to demonstrate the existence of racial bloc voting.[36] "*Shaw* makes it plain that the state's intention to

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Here, Texas was under no legal compulsion to draw the districts along racial lines as it did. Moreover, *UJO* involved the drawing of *compact* majority non-white districts. Thus, unlike the case here, race did not override all traditional districting considerations.

[34] Once a plaintiff has successfully shown that strict scrutiny applies, the state must justify its race-based determination. *Shaw v. Reno*, 113 S. Ct. at 2825, 2832; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989); *Miller*, 1994 WL 506780 at *21. Thus, even though the Appellees bear the ultimate burden of proof with respect to their constitutional claim, the State must make an affirmative showing that its action satisfies strict scrutiny. *Vera*, slip op. at 85, State App. 70a ("[T]he State has the burden of producing evidence of narrowly tailoring to achieve its compelling state interest.").

[35] The United States took this position below. *See Vera*, slip op. at 86-87, State App. 71a-72a.

[36] Even if Texas could prove that such bloc voting is an impediment to minority participation in the political process—and it cannot—Texas may not use such a showing as an excuse to disregard all other considerations by drawing bizarre districts. *See Shaw v. Reno*, 113 S. Ct. at 2832 ("race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State 'employ[s] sound districting principles,' ") (*quoting UJO*, 430 U.S. at 167-68).

comply with the Voting Rights Act when it created such [bizarrely shaped] districts [for the purpose of racially segregating voters] will not necessarily save it constitutionally; the Voting Rights Act may not be used to sanction the 'racial apartheid' that *Shaw* and the Fourteenth Amendment condemn." *Vera*, slip op. at 84, State App. 69a.

In any event, the Voting Rights Act may have permitted the creation of certain majority-minority districts, but it by no means compelled their creation. *Shaw v. Reno*, 113 S. Ct. at 2830 ("[I]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires."). Texas has failed to show that it was required to draw any of the challenged districts as it did under either § 2 or § 5.

HB 1 changed CD 18 from a compact, competitive district with a 35.1% total Black population into a bizarre, racially "safe" district of 50.9%. In addition, HB 1 created three other "safe" single-race majority districts—CDs 28, 29, and 30. None of these changes was required by the Voting Rights Act.

Texas has not and cannot show that the three preconditions for a vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986), are present. *Shaw v. Reno*, 113 S. Ct. at 2830 (three *Gingles* conditions "never can be assumed, but specifically must be proved in each case"). The first factor—that the "[minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50-51—presupposes compact districts that conform to traditional districting principles. As discussed above, these districts quite plainly fail that test. *See* Section II(B)(1)-(2), pp. 18-21, *supra*.

Nor has Texas proven the third *Gingles* factor: "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Gingles, 478 U.S. at 50-51. As the lower court found, "[i]n Texas in the 1990's, it is no longer accurate to assume that this condition of *Gingles* exists in every case." *Vera*, slip op. at 87 n.54, State App. 71a n.54. Evidence of cross-racial voting eliminates any possible claim that the State was required to create single-race majority voting districts under § 2. *Id.* at 87-88, State App. 71a-72a.[37]

Moreover, even when a minority community's preferred candidate is defeated, *Gingles* requires proof that an Anglo racial voting bloc *systematically* denies minorities the opportunity to elect the candidates of their choice. Given the degree of racial cross-voting that takes place today in Texas,

> there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground.

Johnson v. DeGrandy, 114 S. Ct. 2647, 2661 (1994). *See also League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850-51 (5th Cir. 1993) (*en banc*) (concluding that minority judicial candidates were defeated because of partisanship not race).

Thus, Texas's contention that § 2 mandated HB 1 is "wholly unsupported" and "incorrect." *Vera*, slip op. at 86-87 n.54, State App. 71a n.54.[38] In addition, as the

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[37] *See also Miller*, 1994 WL 506780 at *34 (holding that evidence that white Georgia voters voted for Black congressional candidates from 22% to 38% of the time and that Black voters supported white candidates from 20% to 23% of the time indicated a "lack of solid evidence of black vote cohesion or rampant bloc voting;" thus, § 2 was not triggered).

[38] Likewise, Texas cannot rely on § 5 of the Voting Rights Act to justify HB 1. First, § 5 only requires a state "to preserve

District Court found, Texas has utterly failed to adduce any other studied and legitimate justification for its racial classification.[39]

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extant 'minority' Districts; it [does] not require the creation of new minority [d]istricts." *Vera*, slip op. at 87 n.54, State App. 71a n.54 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)). Thus, there can be no argument that § 5 required the creation of CDs 29 or 30. In addition, states are not obligated to preserve minority districts, where, as in CD 18, the minority population has moved away. *See, e.g., City of Richmond, Virginia v. United States*, 422 U.S. 358, 371 (1975). Moreover, § 5 does not give covered jurisdictions "*carte blanche* to engage in racial gerrymandering in the name of retrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding nonretrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 113 S. Ct. at 2831.

[39] The United States's contention that Texas has a compelling governmental interest in "affirmative action redistricting" to remedy past racial discrimination in voting misconstrues this Court's case law as to when race may be used to remedy past racial discrimination. Post-Trial Brief of the United States at 23-24, 80. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). In addition, a state must have a " 'strong basis in evidence for [concluding] that remedial action [is] necessary.' " *Shaw v. Reno*, 113 S. Ct. at 2832 (*quoting Croson*, 488 U.S. at 500). Other than a few *post-hoc* rationalizations advanced by counsel at a late stage in the proceedings below, Texas has made no serious attempt to gather or present such evidence. *See Vera*, slip op. at 86 n.53, State App. 71a n.53. This failure is fatal to the United States's claim. Moreover, the Fourteenth Amendment may bar states from doing more than what the Voting Rights Act requires in remedying prior discriminatory voting practices. *See Shaw v. Reno*, 113 S. Ct. at 2832 (noting that in *UJO* "only three justices . . . were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act.") (*quoting UJO*, 430 U.S. at 167-68); *Miller*, 1994 WL 506780 at *23 (a compelling governmental interest in remedying past discriminatory voting practices does not exist independent of the Voting Rights Act); *Shaw v. Hunt*, 861 F. Supp. at 488 (Voorhees, J., concurring in part and dissenting in part) (same).

IV. EVEN IF TEXAS DID HAVE A COMPELLING GOVERNMENTAL INTEREST IN DRAWING DISTRICT LINES DETERMINED BY RACE, TEXAS CANNOT SHOW THAT IT EMPLOYED NARROWLY TAILORED MEANS TO CREATE DISTRICTS 18, 29, AND 30.

Texas clearly failed to use narrowly tailored means in creating CDs 18, 29, and 30. Only if the districts as drawn "have the least possible amount of irregularity in shape" and are consistent with "traditional districting criteria" can a state show that it used narrowly tailored means. *Shaw v. Reno*, 113 S. Ct. at 2832.[40] In addition, "[w]here obvious alternatives to a racially offensive districting scheme exist . . . bizarre districts are not narrowly tailored." *Vera*, slip op. at 89, State App. 74a.

Texas acknowledges that it could have drawn the same number of racially competitive districts as it did in HB 1, with compact and contiguous districts that respected existing political subdivisions and preserved cohesive neighborhood interests. *See, e.g.*, Senator Johnson Plan C500 and Owens-Pate Plan 606 for Dallas County; Owens-Pate Plan 606 and Dr. Weber Plan 676 for Harris County. Had any of these numerous alternative plans been implemented, however, Texas could not have made the districts as racially "safe" as it desired. Texas's refusal to implement these alternative districting plans is sufficient, *in and of itself*, to show that Texas failed to use narrowly tailored means in creating districts 18, 29, and 30.

Moreover, as noted above, CDs 18, 29, and 30 are extraordinarily non-compact and non-contiguous, fail to respect existing political subdivisions, and frustrate if not preclude effective political representation and voter participation. *See* Section II.B(1)-(2), pp. 18-21, *supra*.

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[40] *See also Hays I*, 839 F. Supp. at 1208 (invalidating a "Z"-shaped Louisiana congressional district in part because the district failed to respect traditional districting principles and thus was not narrowly tailored).

Accordingly, Texas cannot show that it employed narrowly tailored means in engaging in racial gerrymandering.

CONCLUSION

For the reasons set forth above, Appellees urge the Court to summarily affirm the judgment below or, alternatively, to affirm such judgment after plenary review.

Respectfully submitted,

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